No. 751

In the

Supreme Court of the United States

October Term, A. D. 1954

WEST TEXAS UTILITIES COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

FRANK CAIN,
830 Mercantile Bank Building,
Dallas, Texas.
Attorney for Petitioner.

Of Counsel:

JULIUS A. TRACY, JR.,
830 Mercantile Bank Building,
Dallas, Texas.

IRION, CAIN, BERGMAN AND COCKE,
830 Mercantile Bank Building,
Dallas, Texas.

WARLICK LAW PRINTING CO. - LAW BRIEF PRINTING - DALLAS - RI-6711

No.

In the

Supreme Court of the United States

October Term, A. D. 1954

WEST TEXAS UTILITIES COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, West Texas Utilities Company, respectfully petitions this Honorable Court for a writ of certiorari to review the decree of the Court of Appeals for the Fifth Circuit rendered in this cause on the 4th day of February, 1955, and to also review an order of the Court of Appeals for the Fifth Circuit rendered in this cause overruling a motion for rehearing *en banc* in this cause on the 22nd day of March, 1955, and respectfully shows the following:

I

JURISDICTIONAL STATEMENT

1. The date of the decree sought to be reviewed by a writ of certiorari is February 4, 1955.

2. The date of the order overruling motion for rehearing *en banc* likewise sought to be reviewed by a writ of certiorari is March 22, 1955.

3. The date of the order staying the execution of the decree of the Court of Appeals for the Fifth Circuit is the 31st day of March, 1955, and said order stays the execution of the decree for thirty days from such date in order that your petitioner might petition this Court for a writ of certiorari.

4. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 1254 of Title 28 of the United States Code.

II

QUESTIONS PRESENTED FOR DETERMINATION

1. Did the Court of Appeals for the Fifth Circuit err in denying the motion of Respondent for rehearing *en banc* of this cause in that no rules have been heretofore adopted for proceedings in such matters by this Circuit in accordance with 28 U. S. C., Section 46(c) as interpreted by this Court in *Western Pacific Railroad Corporation v. Western Pacific Railroad Company, 345 U. S. 247, 73 Sup. Ct. 656, 97 L. Ed. 986?*

FILED THROUGH POOR COPY

2. Did the Court of Appeals for the Fifth Circuit err in its decree for this cause, in that no opinion was written and based upon the only possible interpretation which such a decision could have, causes a direct conflict between this case and the decision of this same Court of Appeals with one of its former decisions recently decided in *National Labor Relations Board v. Steinberg, 182 F. 2d 850,* and in conflict also with the case of *National Labor Relations Board v. Carroll, 120 F. 2d 457,* decided by the United States Court of Appeals for the First Circuit?

3. Does this decision of the Court of Appeals being contra to the undisputed facts in this case set forth by the undisputed evidence in the record and testimony submitted below cause a complete and direct conflict with the letter, spirit and intent of the law as has been formerly decided in other Courts of Appeal and in this Court?

III

STATUTES AND REGULATIONS INVOLVED IN THIS CAUSE

Title 28, Section 46(c), United States Code

Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the Circuit Judges of the Circuit who are in active service. A court in banc shall consist of all active Circuit Judges of the Circuit.

IV

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is an action brought in the United States Court of Appeals for the Fifth Circuit by the National Labor Relations Board, as petitioner, against West Texas Utilities Company, as respondent, for the enforcement of its order issued by the National Labor Relations Board against West Texas Utilities Company on April 23, 1954, in Case Nos. 16-CA-411, 16-CA-466 and 16-CA-545 pursuant to Section 10(e) of the National Labor Relations Act as amended *(51 Stat. 136, 29 U. S. C., Section 151, et seq.)*, following the usual proceedings under Section 10 of the Act. The Board's decision and order is reported in 108 N. L. R. B. No. 80, subsequent to which time the Board issued its order denying Respondent's motion for a reconsideration on May 25, 1954.

The Board order cites the finding that Respondent, West Texas Utilities Company, is guilty of a violation of Section 8(a) (3) of the Act, and merely incidentally thereto Section 8(a) (1), in objecting to the employment by Respondent's independent contractor, Southwest Electric Company, of a man who was a paid Union organizer who made repeated threats against Respondent.

The question presented below was fundamentally whether the Respondent could be held responsible for an alleged discrimination against the employee of an independent

contractor and as to whether the Board's coined phrase "intimate business character" abrogates the law of agency.

Another question submitted to the court below was whether there was evidence on the record as a whole to support the Board's finding that Respondent, West Texas Utilities Company, would be accountable under Section 8(a) (3) of the Act for discrimination against the employee even if the question presented above was decided against the Respondent. The record is uncontroverted that the employee was a Union organizer and had made repeated threats against Respondent.

To these questions, the Board had found previously that Southwest Electric Company was effectually an independent contractor in its relations with Respondent and that the contract between Southwest and Respondent delegated complete authority from Southwest to Respondent for Respondent to remove any employee from Southwest's job. The Board further found that Southwest had refused the alleged discriminated employee employment because Respondent had objected to him on the ground that he was a Union organizer and because he had made threats of economic destruction against Respondent, and it was also conceded that the employee was in fact a Union organizer and had made repeated threats against West Texas Utilities Company.

Upon the petition of the National Labor Relations Board for enforcement of its order, and after receiving the briefs and argument of counsel for both parties to this contro-

versy, the Court of Appeals for the Fifth Circuit issued its per curiam decision without opinion on February 4, 1955, granting the petition for the enforcement of the order of the National Labor Relations Board.

Immediately thereafter, Respondent, West Texas Utilities Company, petitioner in this Court, filed its motion for rehearing *en banc* setting forth the direct conflict in the decision in this case with one of the court's own decisions recently decided, and also pointing out the conflict which this decision would cause with another decision out of the United States Court of Appeals for the First Circuit.

Respondent thereafter amended its motion for rehearing *en banc* setting forth, that this Circuit has failed to amend it rules regarding application for rehearing *en banc* consistent with 28 U. S. C., Section 46(c), and requesting further that this matter be referred to and heard by the Court *en banc* pursuant to 28 U. S. C., Section 46(c), by virtue of the conflict in opinion heretofore referred to, and by virtue of the fact that at the time of filing the motion for rehearing *en banc* only one active Circuit Judge remained of the panel to act on the motion for rehearing.

The Court overruled the petition for rehearing *en banc* by a decision of the same division which heard the matter originally and without proper presentation of the motion to the whole Court.

Respondent below then moved that the decree be stayed pending the filing by Respondent of an application for a

writ of certiorari to this Court, which stay was granted by the Court for a period of thirty days.

V

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decision of said Court of Appeals in overruling Respondent's, West Texas Utilities Company, motion and amended motion for rehearing *en banc* without a proper presentation of the matter to the whole court for determination as to the granting of such motion is in conflict with the recent decision of this Court in the interpretation of 28 U. S. C., Section 46(c), in *Western Pacific Railroad Corporation, et al. v. Western Pacific Railroad Company, et al., 345 U. S. 247, 73 Sup. Ct. 656, 97 L. Ed. 986.*

The Court of Appeals for the Fifth Circuit has failed to amend or change their rules of procedure or set up a rule of procedure whereby a litigant might file its motion for a hearing or rehearing *en banc* for consideration by the complete court or by a division of said court so delegated by the majority for such purposes.

Without this procedure being previously outlined by the Court, a litigant is left in the dubious position as to what is to be required of him in the proper presentation of his petition for a hearing or rehearing *en banc* before the complete court.

In the case at bar the court has established no procedure whereby a motion for rehearing *en banc* is to be processed

and heard either by the court as a whole or through its authorized delegation to a division in accordance with a certain prescribed set of rules and regulations, and since no such procedure has been so provided, the Fifth Circuit is left with but one alternative where a litigant has requested and petitioned for a hearing *en banc*, and that is to proceed with the presentation and determination of such petition or motion before the complete court in that no delegation of power has been created.

This was not done in the instant case. The motion for rehearing *en banc* was acted upon by the same division of the court who heard the original appeal, with only one of the judges being an active judge of the court at the time, and, therefore, was acted upon summarily in a manner not authorized by the complete court in accordance with 28 U. S. C., Section 46(c) as interpreted by the *Western Pacific Railroad* case, supra, and such action was an error detrimental to the rights of this Respondent.

Therefore, since there has been no delegation of power by the complete court as suggested in the *Western Pacific Railroad* case and inasmuch as said motion for rehearing *en banc* in the instant case was summarily overruled by the division originally hearing said appeal, this action of the court was without authority, and the matter should be vacated and remanded with direction to comply with the provisions set forth in 28 U. S. C., Section 46(c), as interpreted by the *Western Pacific Railroad* case.

Also, a similar interpretation of the question here presented was involved in the case of *William H. Banks Ware-*

BLEED THROUGH POOR COPY

house, Inc., et al. v. Watt, et al., 345 U. S. 932, 73 Sup. Ct. 793, 97 L. Ed. 1361, and *Bradley Mining Company v. Boice, 345 U. S. 932, 73 Sup. Ct. 797, 97 L. Ed. 1361.*

Petitioner, West Texas Utilities Company, deemed that the urgency and importance of the issues so decided by the Court of Appeals for the Fifth Circuit are such as to warrant a rehearing *en banc* by virtue of the conflict in decisions, and is entitled to a determination by the whole Court pursuant to 28 U. S. C., Section 46(c), to a consideration of such request.

2. The decision of said Court of Appeals being per curiam without an opinion and therefore giving no statements or findings of the Court in arriving at such a decision, leaves Respondent, West Texas Utilities Company, in a most difficult position to determine upon what possible grounds the Court ordered enforcement of the National Labor Relations Board order in this case in the absence of an opinion.

The only possible way the Court could have so determined was to have held that the employer, Southwest Electric Company, of the employee allegedly discriminated against was in fact the agent of Respondent, West Texas Utilities Company, and was not an independent contractor. To arrive at such a decision based upon the undisputed evidence in this case, creates a direct conflict by this Court with one of its own decisions recently decided in *National Labor Relations Board v. Steinberg, 182 F. 2d 850,* and likewise in conflict with the case of *National Labor Rela-*

tions Board v. Carroll, 120 F. 2d 457, decided by the United States Court of Appeals for the First Circuit.

WHEREFORE, your Petitioner, West Texas Utilities Company, prays that a writ of certiorari issue under the seal of this Court directed to the Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court the full and complete transcript of the record and of the proceedings of the said Court of Appeals for the Fifth Circuit had in the case numbered and docketed Docket No. 15186, National Labor Relations Board, Petitioner v. West Texas Utilities Company, Respondent, in that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said Court of Appeals for the Fifth Circuit and the National Labor Relations Board as has previously decided be reversed by this Court, and for such further relief as to this Court may seem proper.

DATED April 25, 1955.

FRANK CAIN,
830 Mercantile Bank Building,
Dallas, Texas.
Attorney for Petitioner.

Of Counsel:
JULIUS A. TRACY, JR.,
830 Mercantile Bank Building,
Dallas, Texas.

IRION, CAIN, BERGMAN AND COCKE,
830 Mercantile Bank Building,
Dallas, Texas.

BLEED THROUGH POOR COPY

I certify that copies of this Petition hve been served by air mail as follows:

1. GENERAL COUNSEL
   National Labor Relations Board
   Washington, D. C. — 1 copy

2. MR. A. NORMAN SOMERS
   Assistant General Counsel
   National Labor Relations Board
   Washington, D. C. — 1 copy

3. MR. DAVID P. FINDLING
   Assistant General Counsel
   National Labor Relations Board
   Washington, D. C. — 1 copy

4. MR. MARCEL MALLETT-PREVOST
   Assistant General Counsel
   National Labor Relations Board
   Washington, D. C. — 1 copy

5. MR. FREDERICK U. REEL
   Attorney, National Labor Relations Board
   Washington, D. C. — 1 copy

6. SOLICITOR GENERAL
   Department of Justice
   Washington 25, D. C. — 1 copy

Frank Cain

FRANK CAIN

SWORN TO AND SUBSCRIBED BEFORE ME this 25th day of April, 1955.

Reba Bailey

Reba Bailey
Notary Public,
Dallas County, Texas.

APPENDIX

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15186

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

WEST TEXAS UTILITIES COMPANY,
Respondent.

PETITION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, SITTING AT WASHINGTON, D. C.

(February 4, 1955.)

Before HOLMES and BORAH, Circuit Judges, and DAWKINS, District Judge.

PER CURIAM:

The petition for enforcement of the order of the National Labor Relations Board is granted.

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15186

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

WEST TEXAS UTILITIES COMPANY,
Respondent.

PETITION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, SITTING AT WASHINGTON, D. C.

ON RESPONDENT'S MOTION FOR ORAL ARGUMENT AND PETITION FOR A REHEARING

(March , 1955.)

Before HOLMES and BORAH, Circuit Judges, and DAWKINS, District Judge.

BY THE COURT:

It is ordered that the motion for oral argument in the above styled and numbered cause be, and the same hereby is, overruled, and that the petition for rehearing be, and the same hereby is, denied.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Argument	8
Conclusion	12
Appendix	13

CITATIONS

Cases:

Austin Company, 101 NLRB 1257	9
Butler Bros. v. *National Labor Relations Board*, 134 F. 2d 981, certiorari denied, 320 U.S. 789	8
Kennedy v. *Silas Mason Co.*, 164 F. 2d 1016	11
National Labor Relations Board v. *Carroll*, 120 F. 2d 457	9, 10
National Labor Relations Board v. *Condenser Corp.*, 128 F. 2d 67	8
National Labor Relations Board v. *Gluek Brewing Co.*, 144 F. 2d 847	8
National Labor Relations Board v. *Long Lake Lumber Co.*, 138 F. 2d 363	8
National Labor Relations Board v. *New Madrid Mfg. Co.*, 215 F. 2d 908	8
National Labor Relations Board v. *Steinberg*, 182 F. 2d 850	9
Phelps Dodge Corp. v. *National Labor Relations Board*, 313 U.S. 177	9
Radio Officers' Union v. *National Labor Relations Board*, 347 U.S. 17	10
In re Sacher, 206 F. 2d 358	11
St. Johns River Shipbuilding Co. v. *Adams*, 164 F. 2d 1012	11
West Texas Utilities Co. Inc., 85 NLRB 1396, 184 F. 2d 233, certiorari denied, 341 U.S. 939	3

Cases—Continued

Page

West Texas Utilities Co., Inc. v. *National Labor Relations Board*, 206 F. 2d 442, certiorari denied, 346 U. S. 855 3

Western Pacific Railroad Case, 345 U.S. 247..... 7, 10

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):

Section 2(2) 8, 13

Section 2(3) 8, 9, 13

Section 2(9) 8, 14

Section 7 14

Section 8(a)(1) 8, 9, 15

Section 8(a)(3) 8, 9, 15

Section 8(a)(5) 9, 15

Section 8(b)(4)(B) 9, 15

Section 8(b)(4)(C) 9, 16

28 U.S.C. 46(c)..... 3

Miscellaneous:

21 Chi. L. Rev. 447..... 11

Rules:

Third Circuit, Rule 5(3) 11

Eighth Circuit, Rule 15(e)..... 11

Ninth Circuit, Rule 23..... 11

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 751

WEST TEXAS UTILITIES COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* order of the court below, enforcing without opinion the order of the National Labor Relations Board, is reported at 218 F. 2d 824. The findings of fact, conclusions of law, and order

of the Board (R. 150-221)[1] are reported at 108 N. L. R. B. No. 80.[2]

JURISDICTION

The judgment of the court below was entered on February 4, 1955. A petition for rehearing *en banc* was denied on March 22, 1955. The petition for a writ of certiorari was filed on April 27, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Under a contract between petitioner and Southwest Electric Company, whereby the latter undertook to perform certain construction work on petitioner's property, petitioner reserved the right to compel Southwest to remove any employee from the work. Pursuant to this clause petitioner compelled Southwest to refuse employment to Alton Ray because of Ray's union activities. The first question presented is whether in so doing petitioner violated Section 8(a)(1) and (3) of the Act.

2. Whether the court below committed reversible error by denying petitioner's motion for rehearing

---

[1] The symbol "R" refers to the Transcript of Record printed as Volume I pursuant to the rules of the court below; the symbol "B.A." refers to the appendix to the brief filed by the Board in the court below.

[2] The only portions of the Board's findings, conclusions, and order now pertinent to this litigation are to be found at R. 158-163, 198-213. The remaining portions of the intermediate report and decision deal with matters not raised in this Court or in the court below.

en banc without having promulgated rules governing *en banc* rehearings.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 13-16. 28 U. S. C. 46(c) is reprinted in the Petition, p. 3.

STATEMENT

I. The Board's Findings of Fact

In 1946, Alton S. Ray, who had worked for petitioner from 1926 to 1941, became a part-time, paid business agent and member of the negotiating committee of Local 898, International Brotherhood of Electrical Workers, AFL, hereafter called the Union (R. 198; B. A. 9, 21). Thereafter, he participated with that committee in the futile negotiations with petitioner which led to a decree directing petitioner to bargain in good faith and a further decree holding petitioner in contempt because of its disobedience.[3]

In addition to his work for the Union, Ray worked as an electrician to supplement his income (R. 198; B. A. 21). About April 28, 1951, Ray was employed by Southwest Electric Company (hereafter called Southwest) on a maintenance job which it was performing for petitioner at the lat-

[3] *West Texas Utilities Co., Inc.*, 85 NLRB 1396, 1411, enforced 184 F. 2d 233 (C.A. D.C.), certiorari denied, 341 U.S. 939; *West Texas Utilities Co., Inc.* v. *National Labor Relations Board*, 206 F. 2d 442 (C.A. D.C.), certiorari denied, 346 U.S. 855.

ter's power plant in San Angelo, Texas (R. 198; B. A. 24-25). Southwest was performing this work under an oral, cost-plus contract. The parties agreed to be governed, *inter alia,* by the following provision of a written form construction contract (B. A. 46):

> 6. ERECTION: Contractor shall provide all labor, tools, hoists, materials, scaffolding, false-work, etc., which may be necessary for the WORK, and shall take out and pay for any required permits. Contractor shall maintain a competent superintendent at the site at all times to supervise the WORK and conduct it in cooperation with purchaser or the consulting engineers, and in coordination with all other work being done on the premises. *If in purchaser's judgment it is desirable, contractor shall at purchaser's request remove any employee from the* WORK. [Emphasis added.]

About a week after Ray was so employed, petitioner's production superintendent, Hamilton, stated to Peters, vice-president of Southwest: "You know you have a man on your job that caused us considerable trouble" (R. 198; B. A. 34). Hamilton identified the man as Ray, but Peters continued to employ him (*ibid.*). Late in July, 1951, petitioner's attorney, Cain, told its vice-president, Schroeder, "to get Mr. Ray off of that job" (R. 198-199; B. A. 38). A day or so thereafter, about July 26, 1951, the project was shut down

because of a shortage of materials (R. 199; B. A. 25).

During the period of the shutdown Ray continued to be active in the bargaining negotiations which, as stated above, culminated in a contempt decree against petitioner (R. 199-202; B. A. 10-14, 36-37).

In February, 1952, Southwest resumed its maintenance work at petitioner's San Angelo power plant (R. 204; B. A. 33). In the early part of March, Hardin, who was in charge of electrical construction for petitioner, stated to Southwest's vice president, Peters: "Pete, I'd rather that you wouldn't get Curley [Ray] back to work." When Peters inquired whether there was a reason for this request, Hardin replied: "Well, not that I know of, but * * * there has been some conversation about it and I think it will cause confusion if you do" (R. 204; B. A. 30-31). Shortly thereafter, Peters advised Ray that there were "some company objections to him returning to work" (B. A. 25-26).

About March 12 Peters requested Ray to supply him with two electricians. Ray replied that he was available and would present himself for employment, and asked Peters why petitioner objected to him. Peters advised that he did not know but would try to find out. Thereafter, at a conference held on March 15, Whitaker, special engineering assistant to petitioner's president, advised Peters that petitioner objected to Ray "because he was a union organizer and because of threats that he had

made at a recent union negotiation against the Company."[4] Whitaker added that "if [Southwest] were forced to use help that had made a threat against the company, that he would rather do it with company employees." On the same day, Peters informed Ray of petitioner's objections to him. (R. 204-205; B. A. 26-29.)

Pursuant to Peters' request for two electricians, Ray reported to Peters on March 17, 1952, prepared to go to work. Peters, however, advised Ray that he could not put him to work for the reasons previously stated. At Ray's request, Peters repeated to other officials of Southwest that Ray could not be put to work because of the objections stated by petitioner, namely, that Ray was a union organizer and had made threats against petitioner during negotiations. (R. 205-206; B. A. 19-20, 29-30, 41.)

II. The Board's Conclusions and Order

On the basis of these facts, the Board found that petitioner "demanded the nonemployment of Ray because he was an active official of the same union which had organized the [petitioner's] employees and with which union the [petitioner] had labor disputes involving unfair labor practices before this Board and the Courts" (R. 160). The Board further found that even though there was no direct employer-employee relationship between Ray and

[4] The "threats" consisted of a statement that Ray would campaign for municipal ownership of the public utility (R. 203; B.A. 14).

FILMED THROUGH POOR COPY

petitioner, the latter had violated Section 8 (a)(3) and (1) of the Act by causing the discrimination against Ray (R. 160-162).

The Board ordered petitioner to cease and desist from discouraging membership in any labor organization by discrimination, and from in any other manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act. Affirmatively, the Board ordered petitioner to notify Southwest that it withdraws all objection to the employment of Ray on any job that Southwest may have on petitioner's property, to make Ray whole for any loss of pay he may have suffered by reason of the discrimination against him, and to post appropriate notices. (R. 162-165.)

III. Proceedings in the Court Below

The court below enforced the Board's order without opinion. Petitioner thereupon filed a "Motion for Rehearing," and within a day thereafter filed a "Supplemental and Amended Motion for Rehearing." The second document directed the court's attention to the *Western Pacific Railroad Case*, 345 U. S. 247, pointed out that the Fifth Circuit had not since that decision "amended its rules pertinent to procedure for applications for rehearing *en banc*," and asked (a) that the Fifth Circuit sit *en banc* to determine whether rehearing be granted and (b) that the case be reheard before the court *en banc*. The court denied rehearing on March 22, 1955.

ARGUMENT

1. In holding petitioner liable under Section 8(a)(1) and (3) for the discrimination against Ray, the Board and the court below correctly applied the settled rule that one who exercises control over whether a person should be employed is an "employer" or "an agent of an employer" within Section 2 (2) of the Act, and is responsible for his own discriminatory conduct. *National Labor Relations Board* v. *Long Lake Lumber Co.*, 138 F. 2d 363, 364 (C. A. 9); *National Labor Relations Board* v. *Gluek Brewing Co.*, 144 F. 2d 847, 853 (C. A. 8); *National Labor Relations Board* v. *New Madrid Mfg. Co.*, 215 F. 2d 908, 913 (C. A. 8); *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67, 71-72 (C. A. 3); *Butler Bros.* v. *National Labor Relations Board*, 134 F. 2d 981, 985 (C. A. 7), certiorari denied, 320 U. S. 789. The application of this settled principle to the particular facts of this case raises no question warranting review.

Moreover, even if petitioner could not be considered Ray's "employer," it would none the less be liable for having caused him to lose employment. The statute expressly provides in Sections 2(3) and (9) that the "employees" embraced within its protection are not "limited to the employees of a particular employer" and that a labor dispute can arise "regardless of whether the disputants stand in the proximate relation of employer and employee." Similarly, Section 8 (a) (1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise

BLEED THROUGH POOR COPY

of [their] rights * * *"; unlike other provisions of the Act (see, *e. g.*, Sections 8 (a) (5) and 8 (b) (4)(B) and (C)), the prohibition is not expressed in terms of "his" employees. Similarly, Section 8 (a) (3) contains nothing which limits the protection of the section to employees of the employer guilty of the discrimination. Reading Section 8 (a) (1) and (3) in the light of Section 2 (3), it is clear that petitioner is liable for its interference with Ray's rights and for its discrimination against him, for he is an "employee" within the meaning of the Act, and the term is not "limited to the employees of a particular employer." See *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 191-192; *Austin Company*, 101 NLRB 1257, 1258-1259.

Contrary to petitioner's suggestion (Pet. 9-10), the decision below is not in conflict with the decision of the same court in *National Labor Relations Board* v. *Steinberg*, 182 F. 2d 850, or with *National Labor Relations Board* v. *Carroll*, 120 F. 2d 457 (C. A. 1). In *Steinberg* the court held that certain muskrat trappers were independent contractors, and hence were not within the class of "employees" protected against discriminatory discharge; the case is not relevant here, where the person discharged is manifestly an "employee" and not an "independent contractor."[5] In *Carroll* the court upheld the Board's finding that one who carried mail pursuant to a contract with the Post

[5] Two of the three judges who comprised the *Steinberg* court sat on the court below in the instant case.

Office Department was himself the employer of the truck drivers he hired, notwithstanding that the postmaster retained power to require suspension of a driver for inefficiency or other serious delinquency. Apart from the marked differences between the contracts in this case and in *Carroll,* it may be noted that petitioner, unlike the Post Office Department, is not excluded by statute from the category of an "employer," and that the holding in *Carroll,* if applicable here, would establish only that Southwest was likewise liable as an employer under the Act. Since no charge was filed against Southwest, the Board properly proceeded to grant full relief against the only respondent brought before it. *Radio Officers' Union* v. *National Labor Relations Board,* 347 U. S. 17, 52-55.

2. Equally without merit is the contention that the court below erred in denying petitioner's supplemental motion for rehearing *en banc* "without a proper presentation of the matter to the whole court for determination" (Pet. 7). This is not a case like *Western Pacific Railroad Case,* 345 U. S. 247, 263, 265, where the request for rehearing *en banc* was denied by the division which had heard the appeal "as being without authority in law or in the rules or practice of the court", and it then appeared "that the full bench [had] refused completely to consider the merits of the *en banc* request." On the contrary, petitioner implicitly recognizes (Pet. 8) that the request was duly received and rejected on its merits, as befitted the relative simplicity of the case. For this action, in-

BOOK COPY

volving essentially factual issues (here abandoned by petitioner) and well settled legal principles, and provoking no semblance of doubt or dissent in the court below, is in no way comparable to the "difficult and complicated litigation" involving seventeen million dollars on which the court of appeals divided in the *Western Pacific* case.

The Fifth Circuit has demonstrated its readiness in an appropriate case to sit *en banc*. See, *e. g., St. Johns River Shipbuilding Co.* v. *Adams,* 164 F. 2d 1012; *Kennedy* v. *Silas Mason Co.,* 164 F. 2d 1016. While it is true, as petitioner states (Pet. 7), that the court has not embodied its practice relating to *en banc* hearings in formal rules,[6] the same is true for seven of the other ten courts of appeals.[7] For the instant case, at least, it is sufficient that such hearings are available in the court below, that petitioner exercised fully its right to suggest that the case be heard *en banc*, and that the request was properly denied on its plainly unsubstantial merits.

---

[6] The practice of the court below is reported in 21 Chi. L. Rev. 447, 452: "The Third, Fifth, Ninth, and District of Columbia Circuits provide that any member of the panel who feels that the case should be heard *en banc* may consult the other circuit judges. * * * In the Fifth Circuit the panel judge presents the matter to the Chief Judge who will contact the other members of the court if he agrees to the *en banc* hearing."

Cf. In re Sacher, 206 F. 2d 358, 362, where the Presiding Judge of the Second Circuit, which like the court below has no published rule governing *en banc* sessions, polled the circuit judges as to whether they desired to hear the case *en banc*.

[7] Only the Third, Eighth and Ninth Circuits have rules expressly referring to the procedures for convening themselves *en banc*. See the Third Circuit's Rule 5(3), Eighth Circuit Rule 15(e), and Ninth Circuit Rule 23.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
FREDERICK U. REEL,
Attorney,
National Labor Relations Board.

MAY, 1955.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or

in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a

condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: * * * (B) forcing or requiring any other employer to recognize or

bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 343701 3414